(1)

Supreme Court, U.S.
FILED
APR 21 2003
OFFICE OF THE CLERK

No. 02-1558

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2002

DAVID ENTIS REES,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

ROBERT R. HENAK
Counsel of Record
HENAK LAW OFFICE, S.C.
1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

What legal standard applies to determine whether a particular photograph of a nude child, not involved in actual sexual conduct, constitutes "child pornography" which may be banned as opposed to protected expression which legally cannot under the First Amendment.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 5

REASONS FOR ALLOWANCE OF THE WRIT 8

SUPREME COURT REVIEW IS APPROPRIATE TO CLARIFY WHEN A PHOTOGRAPH OF A NUDE CHILD, NOT INVOLVED IN ANY ACTUAL OR SIMULATED SEXUAL ACTIVITY, CONSTITUTES "CHILD PORNOGRAPHY," UNPROTECTED BY THE FIRST AMENDMENT 8

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Ashcroft v. The Free Speech Coalition, 535 U.S. 234, 122 S.Ct. 1389 (2002) 9

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) ... 8

New York v. Ferber, 458 U.S. 747 (1982) 9, 10, 13

Osborne v. Ohio, 495 U.S. 103 (1990) 8, 12, 13

People v. Lamborn, 708 N.E.2d 350 (Ill. 1999) 15-17

Rhoden v. Morgan, 863 F. Supp. 612 (M.D. Tenn. 1994), *aff'd*, 97 F.3d 1452 (6th Cir. 1996), *cert. denied*, 520 U.S. 1176 (1997) 8

State v. Lubotsky, 148 Wis.2d 435, 434 N.W.2d 859 (Ct. App. 1988) 14

State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991) 14

United States v. Amirault, 173 F.3d 28 (1st Cir. 1999) 15-17

United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom., United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987) 14-16

United States v. Knox, 32 F.3d 733 (3rd Cir. 1994) 17

United States v. Villard, 885 F.2d 117 (3d Cir.1989) . 15, 16

United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987) 16, 17

United States v. Wolf, 890 F.2d 241 (10th Cir.1989) 15

Constitution, Rules and Statutes

U.S. Const. amend. I ..... i, 3, 5, 8, 9, 11, 15, 16

U.S. Const. amend. XIV 3

18 U.S.C. §2256(2)(E) 13

28 U.S.C. §1257(a) 2

28 U.S.C. §2101(d) 2

Sup. Ct. R. 10(c) 12, 18

Sup. Ct. R. 13.1. 2

Alaska Stat. Ann. §11.41.455(a) 13

Ark. Stat. Ann. §5-27-302(2) 13

Ark. Stat. Ann. §5-27-401(3) 13

D.C. Stat. §22-3101(5) 13

Del. Code Ann., Tit. 11, §1103(f) 13

Fla. Stat. Ann. §827.071(1)(g) 13

Ga. Code Ann. §16-12-100(a)(4) 13

Hawaii Rev. Stat. §707-750(2) 13

720 Ill. Comp. Stat. Ann. §11-20.1 13

Kans. Stat. Ann. §21-3516(b)(1) 13

La. Rev. Stat. Ann. §14:81.1(B)(3) 13

Mich. Gen. Laws Ann.§750.145c 13

Miss. Code Ann. §97-5-31(b) 13

N.D. Cent. Code §12.1-27.2-01(4) 13

N.H. Rev. Stat. Ann. §649-A:2(III) 13

N.M. Stat. Ann.§30-6A-2(A) 13

N.Y. McKinney's Penal Law §263.00(3) 13

Okla. Stat., Tit.21, §1024.1(A) 13

Ore. Rev. Stat. §163.665(3) 13

Pa. Stat. Ann. §6312(a) 13

R.I. Gen. Laws §11-9-1.3(c)(5) 13

S.C. Code Ann. §16-3-800(2) 13

S.D. Codified Laws §22-22-24.1(16) 13

Tenn. Code Ann. §39-17-1002(7) 13

Tex. Penal Code §43.25(a)(2) 13

Utah Code §76-5a-2(8) 13

Va. Code Ann. §18.2-374.1(A) 13

Vt. Stat. Ann. §2822(a) 13

Wis. Stat. §302.095(2) 3

Wis. Stat. §946.41(1) 4

Wis. Stat. §948.01(7) (1999-2000) 13

Wis. Stat. §948.12 (1999-2000) 3, 13

Wyo. Stat. §6-4-303(a)(iii) 13

Other Authorities

Adler, Amy, *Inverting the First Amendment*,
149 U. Pa. L. Rev. 921 (2001) 11, 12, 16

Adler, Amy, *The Perverse Law of Child Pornography*,
101 Colum. L. Rev. 209 (2001) 11

No. 02-__

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2002

DAVID ENTIS REES,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

Petitioner David Entis Rees respectfully requests that the Court issue a writ of certiorari to review the judgment of the Supreme Court of Wisconsin, denying review of the decision of the Court of Appeals of Wisconsin affirming his judgment of conviction on direct appeal.

OPINIONS BELOW

The order of the Wisconsin Supreme Court denying permissive review is unreported. That order is reprinted in Appendix A to this Petition.

The decision of the Wisconsin Court of Appeals, which affirmed Rees' judgment of conviction, is unreported. That decision is reprinted in Appendix B to this Petition.

The oral decision of the Wisconsin Circuit Court, finding Mr. Rees guilty of possession of child pornography after a non-jury trial, is reprinted in Appendix C to this Petition.

The oral decision of the Wisconsin Circuit Court, denying in part Mr. Rees' motion to dismiss the charge of possession of child pornography is reprinted in Appendix D to this Petition.

JURISDICTION

The Wisconsin Supreme Court entered judgment on January 21, 2003. This Court's jurisdiction is invoked under 28 U.S.C. §§1257(a) & 2101(d) and Supreme Court Rule 13.1. As he did below, Mr. Rees asserts the deprivation of his rights to free expression secured by the United States Constitution

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition concerns the construction and application of the Free Speech Clause of the First Amendment to the United States Constitution which provides:

> Congress shall make no law . . . abridging the freedom of speech . . ..

U.S. Const. amend. I.

This petition also concerns the construction and application of the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides:

> No state shall ... deprive any person of life, liberty, or property, without due process of law....

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

By criminal complaint filed on August 12, 1999, the state charged David Rees with one count of possession of child pornography, Wis. Stat. §948.12.[1] The charge was based on an incident on August 11, 1999, when Mr. Rees possessed and

---

[1] Prior to trial, the circuit court dismissed a separate count of delivering an article to an inmate, Wis. Stat. §302.095(2). That charge accordingly is not at issue in this Petition.

showed to an inmate a number of photographs, including four naturist photographs of children, while visiting the inmate at the Waupun Correctional Institution.

Prior to trial, Mr. Rees moved to dismiss the child pornography count on the grounds that the photographs at issue did not constitute "child pornography" as defined by statute and constitutional standards. Following argument, the Court, Hon. Andrew P. Bissonnette, Circuit Judge, presiding, denied the motion on October 3, 2000) (App.D:1-D:7). That court did hold, however, that one of the four photographs, Exhibit 2, did not meet the standards for child pornography (App. D:4-D:7).

Mr. Rees waived his right to a jury (R100:28-31; R101:3-5) and, on March 29, 2001, the case proceeded to a non-jury trial before Judge Bissonnette regarding the remaining three photographs.[2] The circuit court convicted Mr. Rees on the count of child pornography (App. C:1-C:8), sentenced him to three years probation with condition time of 30 days of home detention, and entered judgment.

Mr. Rees appealed to the Wisconsin Court of Appeals on the grounds that the photographs were not "child

---

[2] Although a separate misdemeanor charge of obstructing an officer in violation of Wis. Stat. §946.41(1), was joined with the child pornography charge for trial, that charge is not at issue in this petition.

pornography," but rather, expression protected by the First Amendment to the United States Constitution and Article I, Section 3 of the Wisconsin Constitution.

On October 31, 2002, the Wisconsin Court of Appeals affirmed (App. B). The Court discussed the conflict between the parties on the applicable legal principles (App. B:3-B:5), but ultimately found "no controlling authority on which standard to employ when reviewing a determination that photographs depict a lewd exhibition of a child's genitals." (App. B:5). The Court ultimately chose not to resolve that conflict and summarily held that one of the three photographs was, in fact, child pornography (App. B:4-B:5).

Mr. Rees timely petitioned the Wisconsin Supreme Court for discretionary review on the issue of whether the three photographs possessed by him were "child pornography" which may be banned as opposed to protected expression which legally cannot under the First Amendment. By Order dated January 21, 2003, that Court denied review (App. A).

STATEMENT OF FACTS

Mr. Rees stipulated at trial that he knowingly possessed the photographs at issue here. Because the sole issue raised on this appeal thus concerns the nature of the photographs themselves, this statement of facts may be brief.

On August 11, 1999, Mr. Rees entered the Waupun Correctional Institution in Waupun, Wisconsin, to visit an inmate in the prison. At that time, he possessed a number of photographs depicting various subjects, many just showing scenery. Included among those photographs, however, were four which depicted children who were wearing no clothing. Exhibit 1 depicts a frontal view of a boy jumping on a trampoline, Exhibit 3 depicts a girl from the back while she is climbing a tree, and Exhibit 4 depicts a frontal view of a girl speaking on the telephone. None of the photographs depicts the children in sexually suggestive clothing, interacting with others, or in actual or simulated sexual activity such as intercourse or masturbation.[3]

During the visit, Mr. Rees allegedly was seen to be showing various of the photographs to the inmate through the glass partition between the visiting area and the inmate. When questioned by the police regarding the photographs, Mr. Rees explained that they were naturalist photographs from Holland and that he had not believed them to be illegal because they can be ordered from nudist magazines and because the photographer was well-known and respected. In fact, the police

---

[3] The circuit court concluded prior to trial that the fourth photograph, Exhibit 2, was not "child pornography." (App. D). That photograph thus is not at issue here.

found a newsletter from the Nudist International Information Center in Holland in his truck. Rees stated that he had received some of the photographs from the inmate he was visiting and that he believed that inmate had litigated some of them in court.

The trial court also admitted evidence of one of two folders seized from Mr. Rees' apartment, which folders contained photographs similar to those in Exhibits 1, 3 and 4.[4] The court admitted the folder, Exhibit 8, for the limited purpose of showing the existence of a filing system used for photographs and not because the photographs themselves had any relevance.

The court also admitted part of a prior, sexually explicit telephone conversation between Mr. Rees and the inmate. The court noted that the call was not relevant to whether the photographs were sexually explicit, but was admitted solely regarding Rees' knowledge of the contents of the photographs.

---

[4] Walworth County, where Rees' apartment is located, filed no charges based on the photographs contained in the folders.

REASONS FOR ALLOWANCE OF THE WRIT

SUPREME COURT REVIEW IS APPROPRIATE TO CLARIFY WHEN A PHOTOGRAPH OF A NUDE CHILD, NOT INVOLVED IN ANY ACTUAL OR SIMULATED SEXUAL ACTIVITY, CONSTITUTES "CHILD PORNOGRAPHY," UNPROTECTED BY THE FIRST AMENDMENT

This case addresses the sometimes hazy intersection between images of children which are properly banned and those which cannot be banned because they are protected by the First Amendment to the United States Constitution. On the one side is "child pornography," while on the other is protected expression.

Two basic legal principles are at war in any case involving allegations of child pornography. It is well-settled that depictions of nudity, without more, constitute protected expression. *Osborne v. Ohio*, 495 U.S. 103, 112 (1990). "Even depictions of nudity involving a minor constitutes protected expression absent a showing that the depictions are 'in some significant way, erotic.'" *Rhoden v. Morgan*, 863 F. Supp. 612, 621 (M.D. Tenn. 1994) (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.10 (1975)), *aff'd* 97 F.3d 1452 (6th Cir. 1996), *cert. denied*, 520 U.S. 1176 (1997). Where the depiction is "neither obscene nor the product of

sexual abuse, it does not fall outside the protection of the First Amendment." *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 1402 (2002) (citation omitted).

It is equally well-settled, however, that child pornography is not entitled to such protection. *E.g.*, *New York v. Ferber*, 458 U.S. 747 (1982). The government has both the authority and the obligation to protect children from actual sexual abuse, and thus has the authority to ban child pornography which is, after all, the memorialization of such abuse. *See id.*

Thus, while materials depicting "child pornography" may give rise to criminal liability, materials which do not depict such pornography legally cannot. The issue before this Court, therefore, is what standard to apply in assessing which principle applies in a given case. How do we answer the question: Is a particular nude photograph of a child constitutionally protected expression or "child pornography?"

Despite large classes of cases which clearly fall on one side or the other, there still remains a significant middle ground for which the exact location of the boundary between child pornography and protected expression is critical. The need for guidance regarding that dividing line is especially important where, as here, the alleged "child pornography" consists merely of pictures of nude children, not involved in any active sexual

activity.

While this Court has upheld against facial challenges statutes defining the prohibited representations in terms of "lewd exhibition of the genitals," *e.g.*, *Ferber*, *supra*, it has neither defined what that phrase means nor explained how to distinguish a "lewd" exhibition from an innocuous one. While the Court in *Ferber* acknowledged that "an expansive construction of the proscription on 'lewd exhibition[s] of the genitals'" would create constitutional problems, it was unwilling at the time to assume that the states would push the envelope in that manner. 458 U.S. at 773.

As demonstrated by at least one authority, however, the lack of sufficient guidance regarding the dividing line between those photographs of nude children which are constitutionally protected and those which are not has resulted in a number of prosecutions or threatened prosecutions for materials which the average American would find innocuous:

> If we pushed the definition in the evolving case law to the extreme, it seems to threaten all pictures of unclothed children, whether lewd or not, and even pictures of clothed children, if they meet the hazy definition of "lascivious" or "lewd." Thus, the capacious law has proved an excellent vehicle for prosecutorial vigilance. Some of the recent cases suggest just how far child pornography law has drifted. Most prominent have been prosecutions against

> "mainstream" targets: In both Alabama and Tennessee, prosecutors . . . brought obscenity and child pornography charges against Barnes & Noble for selling photography books of artists Jock Struges and David Hamilton. (Sturges's studio had been ransacked by an FBI raid in 1993, but a grand jury had refused to indict him for child pornography violations.) Oklahoma brought a child pornography prosecution against a video store for renting the 1979 Academy Award-winning film *The Tin Drum* based on a novel by Günter Grass. Hollywood studios reportedly shunned the remake of the film *Lolita* based on fears of criminal prosecution; despite the filmmakers' careful use of body doubles for all controversial scenes, it took a year, as well as significant cutting, to find a studio willing to release the film. A sixty-five-year-old New Jersey grandmother and respected photographer was arrested for taking nude photographs of her two four to six-year-old granddaughters. The incident is the latest in a number of arrests where parents or family members face charges for pictures that they claim were innocent family snapshots or artistic endeavors. . . ..

Adler, Amy, *The Perverse Law of Child Pornography*, 101 Colum. L. Rev. 209, 240-41 (2001) ("Perverse Law") (footnotes omitted). *See also* Adler, Amy, *Inverting the First Amendment*, 149 U. Pa. L. Rev. 921, 964-65 & nn.192-94 (2001) (listing citations to numerous news accounts of parents

or grandparents arrested for taking or possessing nude photographs of their children); *id.* at 965-69 (discussing numerous recognized artists whose works involving nude children likely could be viewed as "child pornography" under the current ambiguous standards).

While this Court has provided some general guidance regarding where the line should be drawn between protected expression and unprotected "child pornography," these examples show that the line remains quite hazy. While the lower courts have adopted competing standards referencing more specific factors to consider in assessing such cases, this Court, to date, has not defined the constitutional boundaries in this area, leaving the line between protected and unprotected expression ambiguous. *See also Osborne*, 495 U.S. at 133-138 (Brennan, J., dissenting) (demonstrating ambiguity of "lewd exhibition" standard and absence of guidance in application of that standard).

Especially given the important constitutional issues involved, such ambiguity is unacceptable. Review accordingly is appropriate. Sup. Ct. R. 10(c).

Both Federal law and that of many other states define "child pornography" in terms, not only of sexual conduct, but of "lewd" or "lascivious" exhibitions of the child's genitals or

intimate parts.[5] Thus, the Wisconsin Statutes at issue in this case criminalize the possession of any "photograph . . . of a child engaged in sexually explicit conduct." Wis. Stat. §948.12 (1999-2000). The statutory definition of "sexually explicit conduct" includes not merely depictions of actual sexual activity, but also the "[l]ewd exhibition of intimate parts." Wis. Stat. §948.01(7) (1999-2000). This Court upheld against facial challenges similar generalized definitions or interpretations of child pornography in *Ferber*, *supra*, and *Osborne*, *supra*.

Still, the lower courts have taken competing approaches to assessing what is meant by the "lewd" or "lascivious" exhibition of a child's genitals or intimate parts.

One approach is to leave the meaning of such language

---

[5] *E.g.*, 18 U.S.C. §2256(2)(E); Alaska Stat. Ann. §11.41.455(a); Ark. Stat. Ann. §5-27-302(2); Ark. Stat. Ann. §5-27-401(3); Del. Code Ann., Tit. 11, §1103(f); D.C. Stat. §22-3101(5); Fla. Stat. Ann. §827.071(1)(g); Ga. Code Ann. §16-12-100(a)(4); Hawaii Rev. Stat. §707-750(2); 720 Ill. Comp. Stat. Ann. §11-20.1; Kans. Stat. Ann. §21-3516(b)(1); La. Rev. Stat. Ann. §14:81.1(B)(3); Mich. Gen. Laws Ann.§750.145c; Miss. Code Ann. §97-5-31(b); N.H. Rev. Stat. Ann. §649-A:2(III); N.M. Stat. Ann.§30-6A-2(A); N.Y. McKinney's Penal Law §263.00(3); N.D. Cent. Code §12.1-27.2-01(4); Okla. Stat., Tit.21, §1024.1(A); Ore. Rev. Stat. §163.665(3); Pa. Stat. Ann. §6312(a); R.I. Gen. Laws §11-9-1.3(c)(5); S.C. Code Ann. §16-3-800(2); S.D. Codified Laws §22-22-24.1(16); Tenn. Code Ann. §39-17-1002(7); Tex. Penal Code §43.25(a)(2); Utah Code §76-5a-2(8); Vt. Stat. Ann. §2822(a); Va. Code Ann. §18.2-374.1(A); Wis. Stat. §948.01(7); Wyo. Stat. §6-4-303(a)(iii).

vague beyond certain general principles, essentially relying on the "common sense" of the trier of fact. For instance, while recognizing that "[m]ere nudity is not enough," the Wisconsin Supreme Court has not gone beyond the requirements that "the photograph must visibly display the child's genitals or pubic area," and the child must be "posed as a sex object." *State v. Petrone*, 161 Wis.2d 530, 468 N.W.2d 676, 688 (1991). In other words, "the photographs must be sexually suggestive." *Id. See also State v. Lubotsky*, 148 Wis.2d 435, 434 N.W.2d 859, 861 (Ct. App. 1988) ("lewd" means "inciting to lust or lechery").

Neither that Court nor the Wisconsin Court of Appeals has clarified what is meant by these terms or how they are to be assessed in a close case. Indeed, the Wisconsin courts have, for the most part, left the determination of whether given material is protected or criminal to the "common sense" of the jury:

> Last, the court may remind the jurors that they should use these guidelines to determine the lewdness of a photograph,. *but they may use common sense to distinguish between a pornographic and innocent photograph.*

Petrone, 468 N.W.2d at 688 (emphasis added; citations omitted).

A number of other courts, on the other hand, apply a six-factor test articulated in *United States v. Dost*, 636 F. Supp.

828 (S.D. Cal. 1986), *aff'd sub nom., United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987), in assessing whether a particular photograph depicts a lewd or lascivious exhibition. *See, e.g.*, *United States v. Amirault*, 173 F.3d 28, 31-32 (1st Cir. 1999); *United States v. Wolf,* 890 F.2d 241, 244-46 (10th Cir.1989); *United States v. Villard,* 885 F.2d 117 (3d Cir.1989); *People v. Lamborn*, 708 N.E.2d 350, 354 (Ill. 1999).

These so-called "*Dost* factors" are (1) whether the genitals or pubic area are the focal point of the image; (2) whether the setting of the image is sexually suggestive (i.e., a location generally associated with sexual activity); (3) whether the child is depicted in an unnatural pose or inappropriate attire considering her age; (4) whether the child is fully or partially clothed, or nude; (5) whether the image suggests sexual coyness or willingness to engage in sexual activity; and (6) whether the image is intended or designed to elicit a sexual response in the viewer. *See id.* at 832. These "*Dost* factors" are not exhaustive: other factors may be relevant, depending on the circumstances of the case. *See id.*

While applied in principle by many lower courts, the *Dost* standard has been attacked both as too generous to the defendant and as too incoherent adequately to protect the First Amendment interests at stake. For instance, while affirming the *Dost* court's conclusion that the material at issue there was

"child pornography," the Ninth Circuit deemed the standard employed by the district court to be "over-generous to the defendant." *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987).

Professor Adler, on the other hand, views the *Dost* test for assessing "child pornography" as having "produced a profoundly incoherent body of case law." *Inverting the First Amendment*, 149 U. Pa. L. Rev. at 953.

The threshold question noted by Adler is whether the requisite "lewdness" or "lasciviousness" describes the child depicted, the photographer, or the viewer. The Government previously took the position that "lascivious" must mean that the child depicted is "lasciviously engaging in sexual conduct (as distinguished from lasciviousness on the part of the photographer or consumer)." Brief for the United States at 9, *Knox v. United States*, 510 U.S. 939 (1995) (No. 92-1183), 1993 WL 723366. Otherwise, there is no child "sexual conduct" which is what child pornography law purportedly combats.

Some courts have taken this view, holding that "the focus should be on the objective criteria of the photograph's design." *Amirault*, 173 F.3d at 34-35, citing *Villard*, 885 F.2d at 125; *see Lamborn*, 708 N.E.2d at 355. Thus, the substantive intent of either the photographer or the ultimate "consumer" of

the materials is irrelevant. *E.g.*, *Amirault*, 173 F.3d at 34; *Lamborn*, 708 N.E.2d at 355 ("[W]hether defendant was aroused by the photograph is irrelevant in determining whether the photographs are lewd"). If [the defendant's] subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalog into pornography." *Amirault*, 173 F.3d at 34.

Other courts, however, have taken the view that photographs should be viewed from the perspective of the deviant photographer. *See, e.g.*, *Wiegand*, 812 F.2d at 1244 ("lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or likeminded pedophiles"). Still others look to the likely reaction of a pedophilic viewer of the material. *See, e.g.*, *United States v. Knox*, 32 F.3d 733, 747 (3rd Cir. 1994) (relying in part on conclusion that alleged "child pornography" "would appeal to the lascivious interest of an audience of pedophiles"). Of course, this approach overlooks the fact that all pictures of children may become erotic in the hands of pedophiles.

No workable, constitutional, and generally accepted standard has yet been developed for assessing whether a particular depiction of a nude child constitutes "child pornography" or protected expression. Given the variety of approaches taken by the lower courts, there is no reason to

believe that any such uniform standard will soon develop absent intervention by this Court. This case therefore presents the type of compelling reasons generally required for the grant of certiorari. *See* Sup. Ct. R. 10(c).

CONCLUSION

For the reasons stated, the Court should grant a writ of certiorari to review the decision of the Wisconsin Supreme Court.

Dated at Milwaukee, Wisconsin, April 18, 2003.

Respectfully submitted,

ROBERT R. HENAK
Counsel of Record
HENAK LAW OFFICE, S.C.
1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

Attorney for Petitioner

APPENDIX A

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 01-2375-cr

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID ENTIS REES,

Defendant-Appellant-Petitioner.

January 21, 2003

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, David Entis Rees, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Wilcox, J., did not participate.

APPENDIX B

STATE OF WISCONSIN
COURT OF APPEALS

Case No. 01-2375-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID ENTIS REES,

Defendant-Appellant.

October 31, 2002

APPEAL from a judgment of the circuit court for Dodge County; ANDREW P. BISSONNETTE, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1. LUNDSTEN, J. David Entis Rees appeals a judgment convicting him of possessing child pornography contrary to Wis. Stat. § 948.12 (1997-98).[1] Rees argues that photographs in his possession do not meet the statutory standard for child pornography. We disagree and affirm the judgment.

---

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Background

¶2. The facts in this case are undisputed. On August 11, 1999, Rees possessed several photographs of nude children. Rees was charged with one count of possession of child pornography. Following a bench trial, the trial court found that three of the photos showed a "lewd exhibition of intimate parts" and convicted Rees of one count of possessing child pornography.

Discussion

¶3. Wisconsin Stat. § 948.12, entitled Possession of child pornography, states, in relevant part:

> Whoever possesses any undeveloped film, photographic negative, photograph, motion picture, videotape or other pictorial reproduction or audio recording of a child engaged in sexually explicit conduct under all of the following circumstances is guilty of a Class E felony:
>
> (1) The person knows that he or she possesses the material.
>
> (2) The person knows the character and content of the sexually explicit conduct shown in the material.
>
> (3) The person knows or reasonably should know that the child engaged in sexually explicit conduct has not attained the age of 18 years.

¶4. At trial, Rees stipulated that he knowingly possessed the photographs at issue here. On appeal, Rees does not contest that he knew the character and content of the photographs. Nor does Rees

contest that he knew or should have known that the photographs depicted persons under the age of eighteen. Therefore, the sole issue on appeal is whether the images in the photographs depict sexually explicit conduct.

¶5. "Sexually explicit conduct" is defined as a "[l]ewd exhibition of intimate parts." Wis. Stat. § 948.01(7)(e). "Lewd exhibition" is not defined further in the relevant statutes, but the supreme court has stated that:

> Three concepts are generally included in defining "lewd" and sexually explicit. First, the photograph must visibly display the child's genitals or pubic area. Mere nudity is not enough. Second, the child is posed as a sex object. The statute defines the offense as one against the child because using the child in that way causes harm to the psychological, emotional and mental health of the child. The photograph is lewd in its "unnatural" or "unusual" focus on the juvenile's genitalia, regardless of the child's intention to engage in sexual activity or whether the viewer or photographer is actually aroused. Last, the court may remind the jurors that they should use these guidelines to determine the lewdness of a photograph but they may use common sense to distinguish between a pornographic and innocent photograph.

State v. Petrone, 161 Wis. 2d 530, 561, 468 N.W.2d 676 (1991). Thus, we must determine whether the photographs in Rees's possession visibly display a child's intimate parts in a way that unnaturally or unusually focuses on the child's intimate parts.

¶6. The parties disagree on the appellate standard of review. Rees argues that our review should be de novo, citing *United States v.*

Amirault, 173 F.3d 28, 32-33 (1st Cir. 1999). In Amirault, the court concluded that de novo review in a child pornography case is required to ensure that the First Amendment has not been improperly infringed, rejecting the clearly erroneous standard employed in *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987). *Amirault*, 173 F.3d at 32-33. In addition, Rees states that "a determination that speech constitutes libel, obscenity, fighting words, child pornography, or something else categorically excluded from First Amendment protections requires plenary review on appeal to ensure that protected speech is not infringed," citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504-05 (1984), a product disparagement case. Rees contends that applying de novo review in this case is consistent with the practice in Wisconsin of independently reviewing the application of constitutional principles to undisputed facts. *See State v. Patricia A.P.*, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995).

¶7. The State responds that this case is best reviewed as a sufficiency-of-the-evidence claim. The State reasons that because Rees challenges only whether the pictures fall within conduct prohibited by the child pornography statute, and does not challenge the child pornography law on First Amendment grounds, Rees's argument concerns whether the evidence is sufficient to sustain his conviction. The State quotes *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990), to set out this court's review of a sufficiency-of-the-evidence challenge:

> [A]n appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

Id. at 501.

¶8. In the alternative, the State contends that this court should uphold the findings of the trial court unless clearly erroneous, because "whether the photographs involve a `lewd exhibition' under the child pornography statute is a question of fact." The State quotes *Wiegand*, 812 F.2d at 1244, for support: "The question of whether the pictures [of alleged child pornography] fall within the statutory definition is a question of fact as to which we must uphold the district court's findings unless clearly erroneous." Moreover, the State argues that a deferential standard of review is consistent with the supreme court's directive that "the court may remind the jurors that they should use these [previously enumerated] guidelines to determine the lewdness of a photograph but they may use common sense to distinguish between a pornographic and innocent photograph." *Petrone*, 161 Wis. 2d at 561.

¶9. Our review of the relevant case law has unearthed no controlling authority on which standard to employ when reviewing a determination that photographs depict a lewd exhibition of a child's genitalia. Because we would affirm under any of the proposed standards of review, we conclude it is unnecessary to resolve this dispute.

¶10. The trial court found that three of the photographs in Rees's possession depict a lewd exhibition of a child's genitalia. We need not review and discuss all three photographs to sustain Rees's conviction; one is sufficient. We conclude that Exhibit 3 meets the statutory standard.

¶11. Exhibit 3 is a photograph depicting a prepubescent girl

climbing a tree while only wearing shoes. The girl is shown from below. The girl's image nearly fills the photo. The girl's buttocks and genitalia are at the center of the photo. Her right leg is raised up at a ninety-degree angle, exposing her labia to view. It is apparent the photograph was taken with the aid of a flash because the tree and the girl's left arm, which is over her head, are poorly lit when contrasted with the illuminated lower half of the girl's body. We conclude that the photograph unnaturally focuses on the girl's genitalia and buttocks, constituting a lewd exhibition of a child's intimate parts. *Cf. United States v. Wolf*, 890 F.2d 241, 243 (10th Cir. 1989) ("[The girl's] legs are spread apart, exposing her genital region. The primary focus of light in the photograph is the victim's genitals; the victim's head and the other background is barely lit."); *United States v. Knox*, 32 F.3d 733, 747 (3rd Cir. 1994) ("[T]he minor subjects ... were shown specifically spreading or extending their legs to make their genital and pubic region entirely visible to the viewer.").

¶12. Applying a de novo standard of review, we would affirm. Because we would affirm under a de novo review, it necessarily follows that we would affirm under the more restricting standards of review advocated by the State.

By the Court.-Judgment affirmed.

Not recommended for publication in the official reports.

APPENDIX C

STATE OF WISCONSIN
CIRCUIT COURT DODGE COUNTY

STATE OF WISCONSIN,

Plaintiff, Case No. 99-CF-240

v. Case No. 99-CM-530

DAVID ENTIS REES,

Defendant.

ORAL DECISION FOLLOWING
NON-JURY TRIAL
March 29, 2001

THE COURT: Let's go back on the record. The defendant is present here, with both attorneys also present on David Rees; 99-CF-240 and 99-CM-530. The court trial has been completed, but for the decision by the judge. I made reference earlier to a case where some lawyers waived their right to a jury trial on a civil case. In fact, they even submitted the entire trial on paper. It was affidavits and photographs and medical bills. And when I started that decision, I said, you know, a jury -- all they have to do is say, "yes" or "no", or "negligent", "not negligent," "$30,000." We don't know exactly what goes into their verdict and we're probably better off not to know. But I said the Memorandum Decision that I was going to be writing was kind of like making sausage. I mean, you know, the end product might be good, but you don't necessarily want to know how it got made. And I feel like I'm in that position here in this case. I'm not in the same position as a jury, just to say "yes" or "no", thumbs up or thumbs down. But as a judge, I need to make some findings

that then can be reviewed if there is an appeal of the decision.

With regard to the felony count, we've got four photographs here, although three have been received into evidence. The other was excluded on pretrial motions. That's Exhibit Number 2. And we've talked -- all of us have mentioned, I think, the definition of "lewd exhibition of intimate parts," as discussed in the Wisconsin Supreme Court case of State v. Petrone, 161 Wis.2d 530. Actually, what we've discussed is the trial judge's elaboration to the jury and the jury instructions of what was meant by "lewd." And the judge, I think, did a pretty good job there and was affirmed by the Supreme Court. And there he indicated: ". . . 'lewd' has a generally well recognized meaning connoting sexual suggestiveness. Mere nudity does not constitute the type of exhibition which is prohibited by the statute." And I'm actually quoting from the instruction he gave, and I'm continuing to quote: ". . . examples of sexually suggestive or lewd photographs of a child would be those in which the child is depicted or posed in such a way as to depict or suggest a willingness to engage in sexual activity or a sexually coy attitude. Whether or not the child intended such a pose is not the issue, but rather what a reasonable person viewing a photograph would perceive as being suggestive."

The elements here include that the defendant knowingly possessed the photographs. And that's actually been stipulated to. And Exhibit 5 establishes that stipulation. The fourth element, about whether the photographs -- whether the defendant knew or should have known that the photographs depicted persons under the age of eighteen, wasn't really argued by the defense. And I think the photographs speak for themselves, as Mr. Bedker indicated. That element is established.

The arguments here are on the second and third elements, whether, in fact, the photographs depict sexually explicit conduct and, more specifically, lewd exhibition of intimate parts by children

and, even more specifically, relying on Petrone, photographs that would be -- or may be deemed sexually suggestive -- either sexually suggestive or that there's a sexually coy attitude, one or the other would need be established. And then the third element is whether the defendant knew or should have known that the photographs did, in fact, show lewd exhibition of intimate parts.

The court, ultimately, is going to conclude that these show a lewd exhibition of intimate parts. I'm talking about Exhibits 1, 3, and 4. And there's several reasons why I'm going to make that determination. One is Exhibit 2, which the court excluded at an earlier motion hearing, the court excluded that because I indicated that the two naked little girls there were seated on folding chairs or -- yeah, at a campground, seemed to be totally oblivious to the photographer. One looks like she's picking something off of her knee or scratching her knee. Another is sucking her thumb and looking off in some other direction. As I indicated, they seem to be totally oblivious to the camera. And the genitalia of those two children don't necessarily seem to be a focal point of the paragraph [sic]. I just use that as kind of a counter-point to compare Exhibits 1, 3, and 4 with.

Exhibits 1 and 4, especially Exhibit 1 -- let's talk about that -- shows the so-called "trampoline boy" naked. It's a frontal view. He's about a foot off of the trampoline. He's up in midair. His penis is, I guess I would say, parallel to the ground or sticking out about 90 degrees from the rest of his body. Whether that's draft or a semi-erect penis, as argued by Mr. Bedker, I'm not sure. But he's got kind of a -- I don't know what we'd call it -- a sly grin on his face and a smile -- looking at the photographer with a smile in a receptive look or an invitation. And if it's not to the photographer, well, when it's developed, it's to the viewer of the photograph. That's what we're trying to figure out is how this should be interpreted by the viewer of the photograph. If the person in the photograph is totally naked and

is being photographed frontally, is looking at the camera with a grin or a smile on their face, it seems like they know what's going on. Now whether they're old enough to think that this is some type of sexual invitation or not, I guess isn't the point. The point is, how would somebody looking at this photograph perceive it. And, again, the fact that the boy in Exhibit 1 is so aware of the photographer, as compared to the little girls in Exhibit 2, and with the penis being -- sticking out basically 90 degrees from his body, going to the language of the jury instruction, whether or not the child intended such a pose is not the issue, but rather what a reasonable person viewing a photograph would perceive as being suggested.

And the court would believe that a reasonable person viewing that photograph would believe that there is a sexual connotation of being suggestive there by that photograph. Exhibit 4, the girl on the phone in the chair with the nudist photographs on a bulletin board behind here, has her legs spread fairly wide and her eyes are not wide open. Almost a little slit. They're not totally closed, but they're barely open. But it appears that she's looking in the direction of the photographer. And the picture itself is different than all the pictures in the background. In the background, there's pictures of people riding bikes, people at the edge of a swimming pool -- I'm talking about the nudist pictures on the bulletin board -- people on folding chairs at campgrounds, maybe similar to Exhibit 2. I don't think I recognize any others. Some of them, just adults standing naked. But we don't see any apparent photographs of children -- close-ups of children with their genitalia exposed, which is what Number 4 is. And Number 3 is a girl climbing a tree. And we're looking from the ground up towards her, and her buttocks are clearly the focal point, but also visible is her genitalia, I guess the labia. And the reason it's -- that it's visible is because one leg is lifted -- her right foot is on a branch that's several feet -- at least a couple of feet above the branch that her left foot is on, so that right

leg is cocked at an angle where the upper half of the leg is like beyond 90 degrees from the ground. The knee is pointed up or is situated higher than the hip slightly, quite an uncomfortable position to put your leg. And I guess Mr. Rees or someone could argue, well, it's just a picture of a child climbing a tree. But when you're climbing a tree and you're in that position, you're going to keep moving, you're not going to hold that pose for some significant length of time. It's just going to be an instantaneous position that you're going through as you're going up the tree. Interestingly, above that right leg that's cocked so extremely and thus showing the genitalia is a branch about three or four inches in diameter, like three inches above the joint were her -- above the right hip, I'll guess we'll call it that. So if, in fact, she were going to climb the tree from this position, her body would go up about three inches and it would have to stop because her right hip at that point would be lodged against that four-inch branch. I don't see that anybody's actually climbing the tree at this point. Also, I indicated this would be kind of an instantaneous posture she'd be going through if she were actually climbing. But somehow we have the photographer there just at the right time who's using the flash. Because the tree -- you can hardly see the sky. This tree and other trees around here are so dense, you can hardly see the sky. Yet it's a highly illuminated photograph of her rear-end and genitalia. There's clearly a flash being used here. The court believes that a viewer of this photograph would conclude that this was a pose that was being held and not a girl caught in the natural motion of climbing this tree. It's a pose that's being held so that the photographer can photograph her buttocks and genitalia from below with the flash. And, again, it's not what was in the mind of the child, but what was in the mind of the photographer or would likely to be in the mind of the viewer when looking at that photograph and the other photographs.

If the children in these photographs had clothing on, well,

obviously, we wouldn't be here. And they would probably be viewed as relatively natural photographs. If the photographs were of some children riding a bike or fishing or swimming in the nude, playing volleyball, where there genitalia wasn't the focal point of the photograph, I don't think the court could conclude that it was a lewd exhibition of intimate parts. But especially Exhibits 3 and 4, it doesn't seem like there would be any reason to take those pictures, other than to highlight the genitalia of naked young women -- young children. And as I indicated, they're quite different from any of the other nudist photographs on the bulletin board behind this girl.

The court would find that the second element has been established and that the third element is also established, although it may well be -- it may well be that the defendant had a belief that these pictures were legal. But the element is whether the defendant knew or should have known that the photographs showed that -- I'm sorry -- showed the lewd exhibition of intimate parts. There were three things argued by Mr. Bedker as to why he believes the defendant knew that these revealed a lewd exhibition of the intimate parts. First, that he, the defendant, had given a false identification to the police that day -- that afternoon. Once he was apprehended with the photographs, he did persist on the false identification for some period of time; not an extensive period of time, but some period of time of perhaps a half-an-hour. That he had had a phone conversation with Scott McKeever, in which Scott McKeever had referred to "trampoline boy." And the discussion, or that much of it as the court permitted into the trial, established that one or both of these gentlemen felt sexually stimulated by Exhibit Number 1 or photograph -- a similar photograph of a boy on a trampoline. And that the defendant maintained a systematic filing system in which such photographs would be maintained and stored, including Exhibit 8, which contains Envelope Number 6 of "telephone girl," which is empty. And by the way, Exhibit 4, which I think is "telephone girl,"

if you super-impose that over the envelope, it would easily fit into that envelope. Actually, it's almost cut to size to fit into that envelope in Exhibit Number 8. The folder, Exhibit Number 8, has "photos 1 through 8, S.M.," which I assume would be Scott McKeever's initials. But as Mr. Bedker pointed out, it's not the way you normally would arrange photographs of a family or something else. It's more of a system that might be maintained by somebody that has a hobby of photography or even a professional photographer where you catalog and maintain some type of a systematic array of photography. And if these photographs would be kept with some type of hobby or special interest in mind, what would it be? I mean are they kept because of the artistic value? I mean it doesn't look like it to me. If anything, it looks like they would be kept because of the display of genitalia of children depicted therein.

Although only Exhibit 8 was received, my recollection of Detective Engels' testimony was that in a similar file, he saw a reference or an envelope to "trampoline boy," which is, I think, the way Mr. McKeever referred to the boy on the trampoline in the phone conversation. Yes. He said, "Speaking of foreskins . . ." -- I'd like to kind -- " . . . I'd like to find me something like that trampoline boy."

The court would have reason to believe that the trampoline boy picture, Exhibit 1, was part of the collection systematically maintained by the -- by the defendant. Ultimately, on the third element, the court as I commented earlier, I think maybe Mr. Rees had rationalized the facts to the point that he believed these were legal photographs. Nevertheless, the court believes and would find beyond a reasonable doubt that he knew that these were of children in sexually suggestive or sexually coy postures revealing intimate parts; and that, in fact, they do depict children under the age of eighteen. As a -- or before moving off of that subject, with regard to the false ID, consciousness of guilt, the phone conversation with Mr.

McKeever, and the filing system, Mr. Bedker argued those on the third element. And that's the way I referred to them, as well. I think the second element, really, the pictures need to speak for themselves and I think that they do. And that the court did not use those three things mentioned by Mr. Bedker to establish the second element, but only the third element -- to assist in establishing that third element; that there was some reason why there was a false identification given by Mr. Rees when he was apprehended with the photographs.

One other thing that Mr. Bedker didn't mention, and my notes -- I'm not sure if I'm going to be able to find it in my notes, because I took extensive notes like I usually do. But I also have a recollection of Detective Engels saying that he had provided photographs like these to Mr. McKeever about a year ago or at the time of this statement, but had not done so recently because he didn't feel right about it. He thought there was something wrong with it, which would also show, I think, a consciousness or an awareness of what these photographs were about.

APPENDIX D

STATE OF WISCONSIN
CIRCUIT COURT DODGE COUNTY

STATE OF WISCONSIN,

Plaintiff, Case No. 99-CF-240

v. Case No. 99-CM-530

DAVID ENTIS REES,

Defendant.

ORAL DECISION ON
MOTION TO DISMISS
October 3, 2000

THE COURT: Well, Petrone is a long decision and I didn't read all of it. I looked at the relevant parts of it. One of the issues is whether this offense, numbered differently -- the statute's been renumbered, I think, since Petrone -- whether that requires scienter or knowledge or intent on the part of the defendant. The Supreme Court says it did. The fact that the complaint did not specifically allege that did not prejudice the defendant where the court instructed the jury that the State would have to prove that.

But then the next argument was that the photographs did not portray any sexually explicit conduct. And I agree fully with the attorneys that under 948.01, sub (7), there's nothing in these photographs that's within the descriptions of 7(a), 7(b), 7(c), or 7(d), and that the photographs stand or fall here on sub (e), "lewd exhibition of intimate parts." And Section 939.22, sub (19), defines intimate parts as meaning the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

And at page 559 of Petrone, it looks like the majority of the instruction that the Circuit Court gave in defining "lewd" for the jury is set forth at that page of the Wisconsin Supreme Court decision. And it also looks like that definition was pulled from a federal case, a 1983 case in the Fourth Circuit. And the definition included, quote: The word "lewd" has a generally well recognized meaning emoting sexual suggestiveness. Mere nudity does not constitute the type of exhibition which is prohibited by the statute, unquote. And, generally, the definition went on to indicate that examples of sexually suggestive or lewd photographs of a child would be those in which the child is depicted or posed in a way as to suggest a willingness to engage in sexual activity or a sexually coy attitude. And the instruction further indicated that whether or not the child intended such a pose is not the issue, but rather what a reasonable person viewing the photograph would perceive as being suggestive. And towards the end of the instruction, the jury is told that words cannot describe all of the nuances of that which constitutes lewdness. However, with a few general principles in mind, most persons, upon seeing a photograph which is lewd, would be able to agree that it is such. It calls to mind -- I don't know if it was Justice White or whatever on one of the obscenity cases, "I can't tell you what it is, but I know it when I see it." And some of that concept is included in the instruction.

And the court referred to Lubotsky, I think, which had come out after the trial in this Petrone case. And Lubotsky had a little bit different definition, but it seemed like in this case the State Supreme Court reconciled what had been used by the trial judge in Petrone with the legal concepts established in Lubotsky. And the State Supreme Court concluded that the Circuit Court had instructed the jury in this case that "lewd" meanings [sic] sexual suggestiveness, giving "lewd," essentially, the same meaning as inviting to lust or lechery, which is the definition used by the court of appeals in

Lubotsky.

And at page 561, I think already referred to by Mr. Raymond, there were three concepts that generally need to be included in trying to define "lewd." First, the photograph must visibly display the child's genitals or pubic area. I don't know if the Supreme Court was limiting what the definition of "genitals" was, but "intimate parts" seems like it's a little bit broader than "genitals." But in any event, that was the first concept.

The second one is that the child is posed as a sex object; and that the photograph is lewd in its unnatural or unusual focus on the juvenile's genitalia, regardless of the child's intention to engage in sexual activity or whether the viewer or photographer is actually aroused.

And, last, the court may remind the jurors that they should use these guidelines to determine the lewdness of a photograph; that they may use common sense to distinguish between pornographic and innocent photographs. And in concluding its analysis and affirming the conviction, the State Supreme Court said: Looking at the jury instructions as a whole, we conclude that the Circuit Court accurately apprised the jury of what "lewd" means. The Circuit Court told the jurors that mere nudity is not enough; that pictures must display the child's genital area; that the photographs must be sexually suggestive; and that the jurors may use common sense to determine whether the photographs were lewd.

Now the photographs which were marked 1 through 4 on October 7th of last year at the prelim, for the most part, look like they may well have been taken at some type of nudist colony or naturist -- what do they call it -- naturalist site. And looking at all four of them, it is conceivable that the children were totally inert or unconscious of their nudity. And that trying to sexually incite somebody would probably be the furthest from their mind. You could look at the photographs, and they could be viewed in that manner. On the other

hand, some of the photographs, 1, 3, and 4, could also be viewed -- I mean it's possible, certainly, to conceive of these children as having been made aware of their nudity and sexuality and advised that these photographs were going to be taken. And if they had that in mind, then these photographs could equally be viewed as children who were rather bold in their revealing their genitals.

And, ultimately, it doesn't even matter, under what I think I've read here from the State Supreme Court, what the children had in mind. But it's rather what would a reasonable person, viewing the photograph, perceive to have been suggested. And rephrasing that slightly, could a reasonable person find these photographs -- find that these photographs were intended to be sexually suggestive. And I think that a reasonable person could conclude that these children were aware of their state of undress and how the photograph would capture their genitalia. And I think a reasonable person could, therefore, find that these were intended to be sexually suggestive. And, again, I'm talking about 1, 3, and 4.

As to photograph Number 2, I don't -- these children could only be viewed as clearly unconscious of the photographer and with nothing sexual in mind. And there is -- given the distance of the photographer from the subjects and the natural pose of the children as they were seated on these lawn chairs at what looks like a campground, I don't think a reasonable person would find that these were intended to be sexually suggestive or that they do suggest any type of sexual activity or sexually coy attitude. I mean the one child on the left, it looks like she's picking something off of her knee with her right hand. Her left arm is across the mid section of her body and it obscures any view of her genitalia. Her right breast is visible, but there's no breast development at this point in a child of this age. And, again, she's totally concentrating on picking something off of her knee. The other child is sitting there, looking away from the photographer, sucking her thumb, engrossed in whatever -- Mr.

Bedker?

ATTORNEY BEDKER; Judge, it's been a while since I looked at those photographs. But I would submit to the court that those poses are suggestive insofar as the one girl is trying to hide her sexual -- sexuality, so to speak, by covering her vaginal area. But the sucking of the thumb, to me, that's -- a reasonable person could conclude that that's sexually suggestive of oral sex. I don't know, I think the court is perhaps drawing too fine a distinction here. I think the one -- the court's viewpoint, as stated, is certainly one reasonable view of the photograph. But I would submit to the court that twelve persons drawn from random out of the community could reach a different, yet reasonable, conclusion with respect to that photograph. And that's my position.

THE COURT: Well, again, I've read that case this morning. And I'm glad we had that case, because the statute doesn't identify what lewd exhibition is. But having read that case and reread it here as we've been on the record, I think, first of all, the photographs have to portray the genitals or intimate parts of a child. And I think it's arguable -- I mean I think all of them do. And Exhibit 2, it's -- it might even be arguable whether those parts are portrayed. But -- and along with that, a reasonable person has to be able to conclude that what was intended here was that this photograph be sexually suggestive. And you can come up and take it and look at it.

ATTORNEY BEDKER: I guess it begs the question. Why take such a photograph if it wasn't designed to be sexually suggestive, Judge? And, furthermore, you see -- in the girl on the right-hand side, you see her vaginal area fairly clearly depicted there, with her knees raised as she's seated on that chair. And I guess I completely disagree with the court's view of Exhibit Number 2.

THE COURT: I think it's -- I think most people are uncomfortable looking at pictures like this. And I wanted to try to put into words, "You know it when you see it." I'm trying to put into

words why I think the motion -- the defense motion should be denied on Exhibits 1, 3, and 4, is that a viewer could look at these children as children who were fully aware of what was going on and what was being exposed and what photographs were being taken and, therefore, have kind of a bold or suggestive frame of mind. There's no way that any reasonable viewer could view these two girls in Exhibit 2 as having a bold or suggestive frame of mind. They're totally oblivious to what's going on. they're very young. And the photographer is far enough away that there's nothing here to suggest sexual activity or sexual invitation. So I'm denying the motion to dismiss Count 1 because I think the preliminary examination was sufficient, based on photographs 1, 3, and 4. But I -- well, I guess that's all I'm doing. Maybe I'm doing more than that. I'm probably indicating that Exhibit 2 probably shouldn't even be used at the trial, because I don't see any way that a reasonable jury can base a conviction on that.

ATTORNEY BEDKER: Can I -- just for clarity, Judge, I know you've said this several times and I know we're dealing with difficult issues here this morning. But as I interpret what you're saying, you're basing your decision with respect to Photograph Number 2 on the distance that the photographer was from the girls and that the girls themselves don't -- they look oblivious to the fact that they're naked?

THE COURT: I don't think the girls' frame of mind could ever be interpreted by any viewer as that they were somehow being coy, sexually suggestive, bold. I mean the second factor or concept at page 561 in Petrone is that the child is posed as a sex object. The statute defines the offense as one against the child because the child in that way causes -- because using the child in that way causes harm to the psychological, emotional, and mental health of the child. It's going to be hard to find a photograph that shows two children more relaxed, at ease, calm, oblivious, that what is portrayed in Exhibit 2.

I'm just trying to use the law that the Supreme Court is

giving to us on what does it mean to have a lewd exhibition or pose of children. I don't think any reasonable jury could conclude that Exhibit 2 is an example of that. That's all I'm saying.